

UNITED STATES TAX COURT
WASHINGTON, DC 20217

DRC

DYNAMO HOLDINGS LIMITED)	
PARTNERSHIP, DYNAMO, GP, INC., TAX)	
MATTERS PARTNER, ET AL.,)	
)	
Petitioners,)	
)	
v.)	Docket No. 2685-11, 8393-12.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

These consolidated cases are calendared for trial at the special session of the Court beginning January 23, 2017, in Miami, Florida. On June 17, 2016, the Commissioner filed a motion under Tax Court Rule 72(b)(2)¹ to compel the production of documents that petitioners have withheld as privileged. The Court ordered petitioners, Dynamo Holdings Limited Partnership and Beekman Vista, Inc., to respond. On June 29, 2016, petitioners filed a response. On July 7, 2016, the Commissioner filed a reply to petitioners' response. With this Order, we narrow the privilege issues that remain in dispute and order petitioners to produce a privilege log.

Background

These consolidated cases involve related entities. Petitioners share top executives, and they share a computer system.

On July 25, 2013, the Commissioner filed a motion to compel production of documents, requesting that petitioners produce electronically stored information. Petitioners filed an objection arguing that if they should have to produce the electronically stored information, then they should be able to use predictive coding to respond. The Court held a hearing on the motion and issued an opinion on

¹ Unless otherwise indicated, all Rule references are to the Tax Court Rules of Practice and Procedure.

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September 17, 2014. Dynamo Holdings Limited P'ship v. Commissioner, 143 T.C. 183 (2014). In that opinion, the Court granted the Commissioner's motion to compel, but allowed petitioners to respond using predictive coding. Id. at 185, 194.

After the parties established the predictive coding algorithm, the parties submitted to the Court an agreement memorializing the final steps of producing electronically stored information. The Court entered the agreement as an order. In accordance with that order, petitioners ran the predictive coding algorithm on the initial set of documents, which determined the documents to be included in the production. Petitioners ran a second algorithm on the initial set of documents to remove documents tentatively protected from production as privileged. Petitioners provided a list the documents withheld. The list consisted of a table identifying the documents tentatively protected. Although the table included columns that set forth some of the elements of privilege, petitioners did not completely fill out the table. Petitioners produced the production set to the Commissioner, but the parties agreed that petitioners could clawback documents as privileged that were produced through the predictive coding. The documents clawed back were also required to be indicated on a log. In total, petitioners marked 34,153 as tentatively protected on their log. The Commissioner reviewed the documents in the production set and identified 5,796 relevant documents, including documents bated stamped DNM00105777, DNM00106470, and DNM00106490.

On June 17, 2016, the Commissioner filed a motion to compel documents that petitioners claim are privileged. The Commissioner broadly argues that the documents are not protected as privileged because the documents were stored on a shared computer system. The Commissioner also makes document-specific arguments that the documents are not privileged because: petitioners waived privilege by disclosing the documents to a third party; petitioners cannot assert privilege because the author was not an attorney; the communication was to prepare tax returns; the communications was with a Canadian accountant; or petitioners waived privilege for the subject matter of "Project Butterfly" because petitioners disclosed documents bated stamped DNM0010577, DNM00106470, and DNM00106490.

On June 27, 2016, petitioners filed a response, arguing that they do not have to produce the documents because they are privileged. Petitioners explained that they are still sorting through the documents tentatively protected from production as privileged, and that 763 documents are still at issue. On July 7, 2016, the Commissioner filed a reply to petitioners' objection.

On July 8, 2016, the Court held a conference call with the parties. Petitioners explained that they are still determining whether the 763 documents are privileged. Because the Court cannot address specific privilege arguments without a privilege log, the Court asked petitioners when they would be able to review those document and submit a privilege log to the Court. Petitioners stated that they needed two weeks, until July 22, 2016. The Court indicated that it would be inclined to allow 10 days. After reviewing the Court's previous order in this case requiring Beekman to file a response to the Commissioner's motion for partial summary judgment by July 20, 2016, the Court will allow petitioners until July 22, 2016 to respond.

Discussion

The attorney-client "privilege applies to communications made in confidence by a client to an attorney for the purpose of obtaining legal advice, and also to confidential communications made by the attorney to the client if such communications contain legal advice or reveal confidential information on which the client seeks advice." Hartz Mountain Indus., Inc. v. Commissioner, 93 T.C. 521, 525 (1989) (citing Upjohn Co. v. United States, 449 U.S. 383, 839 (1981); see also Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d 1386, 1414 (11th Cir. 1994). The party seeking the protection bears the burden of establishing attorney-client privilege. Bogle v. McClure, 332 F.3d 1347, 1358 (11th Cir. 2003); Bernardo v. Commissioner, 104 T.C. 677, 682 (1995).

Attorney-client privilege is designed to "encourage full and frank communication between attorneys and their clients", Upjohn Co. v. United States, 449 U.S. at 389, but it can be "an obstacle to the investigation of the truth". Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d at 1414. Thus, attorney-client privilege is not without exceptions. Id.

One common exception to the attorney-client privilege is when the communication is disclosed to third parties. Bernardo v. Commissioner, 104 T.C. at 682, 684; see also United States v. Aronson, 781 F.2d 1580, 1581 (11th Cir. 1986); United States v. Gordon-Nikkar, 518 F.2d 972, 975 (5th Cir. 1975). When the privileged communication is disclosed to a third party, the privileged is waived. Bernardo v. Commissioner, 104 T.C. at 682, 684.

The Commissioner broadly argues that petitioners waived all claims of privilege because petitioners disclosed the documents to each other by merely

sharing a computer system. The Commissioner does not argue that there was actual disclosure, but that the mere sharing of a computer system is enough to cause waiver.

Although the Commissioner cites six cases in support of his position, each of those cases is distinguishable. In Alpert v. Riley, 267 F.R.D. 202 (S.D. Tex. 2010) an attorney (Riley) placed privileged files on a third party's computer. Through a series of events, those files made their way to Alpert. Importantly, the court held that that "[n]o privilege was waived when [the attorney] put his information on [the third party]'s computer." 267 F.R.D. at 210. Likewise, in Dev. Specialists, Inc. v. Dechert LLP, No. 11-5984, 2014 WL 3858523 (S.D.N.Y. July 31, 2014) and Soc'y. of Prof'l. Eng'g. Emps. in Aerospace v. Boeing, Nos. 05-1251, 07-1043, 2010 WL 1141269 (D.Kan. Mar. 22, 2010) the party claiming privilege was looking to have information returned that already had been disclosed to its adversary. Similarly, in United States v. Mackey, No. 10-310, 2012 WL 3260462 (N.D.Ga. Aug. 8, 2012), an allegedly privileged memo was voluntarily produced to an adversary. Notably, In re Fountainebleau Las Vegas Contract Litigation, No. 09-2106, 2011 WL 65760 (S.D. Fla. 2011) similarly involved documents that had already been produced to an adversary, and in that case the Court expressly did not address the issue of whether the mere storing of documents on a shared server resulted in a waiver. Id. at n.1. And in Golstein v. Colborne Acquisition Co., 873 F.Supp.2d 932 (N.D. Ill. 2012), individuals' personal and privileged emails were sent through the company's email system. In determining whether privilege was waived, the court looked to whether the individuals knew that their emails would be transferred to a third party when the company was sold. In other words, merely having privileged communications on the company's system was not enough to constitute a waiver.

Similarly, petitioners did not waive attorney-client privilege by sharing a computer system. Waiver occurs when a privileged communication is disclosed. Bernardo v. Commissioner, 104 T.C. at 682-683. The mere act of sharing a computer system does not demonstrate that a privileged communication was disclosed. If we were dealing with paper, what we have here is akin to keeping documents in a basement full of file cabinets. That, alone, is not a waiver. See United States v. Dish Network, L.L.C., 283 F.R.D. 420, 425 (C.D. Ill. 2012) ("The Court will not hold that a party waives claims of privilege by keeping documents in a storage area"); see also Garvey v. Hulu, LLC, No. 11-3764, 2015 WL 294850 (N.D. Cal. 2015) (applying the same rationale to electronic systems). Accordingly, petitioners did not waive their claims of privilege merely by sharing a computer system.

Because petitioners did not provide the Court with a comprehensive privilege log that demonstrates that each document is protected as privileged, we will not address the Commissioner's document-specific arguments at this time. Consistent with the foregoing, it is

ORDERED that respondent will submit for the Court to review documents Bates-stamped DNM00105777, DNM00106470, and DNM00106490 on July 15, 2016. It is further

ORDERED that petitioners shall submit to the Court a privilege log for any of the 763 documents that are not produced by July 22, 2016. The privilege log must include for each document, at a minimum, the following information:

- “From” identifying who wrote or sent the document;
- “To” identifying who received the document;
- “Additional Recipients” identifying anyone other than the author or the recipient who accessed the document;
- “Date” providing the date the document was sent or the last date the document was modified;
- “Subject” providing the general subject matter (but without waiving any privilege); and
- “Privilege Claimed” setting forth the basis of privilege with enough information to demonstrate that the document is protected as privileged.

It is further;

ORDERED that petitioners will include with their privilege log an affiliations list that identifies all of the individuals named in the privilege log, the individual's title or role, and the individual's employer at the time the communication was made.

(Signed) Ronald L. Buch
Judge

Dated: Washington, D.C.
July 12, 2016